

STATE OF MICHIGAN
COURT OF APPEALS

JAMES AMBERG,

Plaintiff-Appellant,

v

CITY OF DEARBORN and CITY OF
DEARBORN POLICE DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED

March 25, 2014

No. 311722

Wayne Circuit Court

LC No. 12-002188-CZ

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

BECKERING, P.J. (*concurring*).

I concur in result only with the majority's conclusion that the trial court did not err when it granted summary disposition to defendants. I write separately because I respectfully disagree with the majority's conclusion that the videos requested in this case were not public records, and because I respectfully disagree with the majority's conclusion that plaintiff's FOIA action could not have been "reasonably necessary" as the phrase is used in *Local Area Watch v Grand Rapids*, 262 Mich App 136, 149; 683 NW2d 745 (2004), simply because the records were potentially available through another source.

MCL 15.232(e) provides, in pertinent part, that a public record is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." As used in the statute, the term "writing" means:

handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. [MCL 15.232(h).]

I agree with the majority that mere possession of a record by a public body does not render it a public record. *Hopkins v Duncan Twp*, 294 Mich App 401, 409-410; 812 NW2d 27 (2011). Rather, "the use or retention of the document must be in the performance of an official function." *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 236; 789 NW2d 495 (2010) (citation and internal quotation marks omitted). I also agree with the majority that the videos at issue in this case were subpoenaed in the course of the official function of the

prosecutor's office. Where I disagree with the majority is in the conclusion that the videos were not public records simply because they were potentially available to plaintiff through other means, such as the discovery process in the underlying criminal case. The fact that the videos were available through other means, including through the discovery process, is not relevant to determining whether the videos were public records. That writings are available through the discovery process can, under certain circumstances, be relevant to a public body's claimed exemption to a FOIA request. See *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 205; 725 NW2d 84 (2006).¹ However, the potential availability of writings through another source is not relevant to determining whether something is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." See MCL 15.232(e). Therefore, the videos sought in this case were public records that were subject to disclosure.

I also disagree with the majority's assertion that, because the videos were potentially available to plaintiff through other means, plaintiff could not be a prevailing party who was entitled to attorney fees. MCL 15.240(6) provides that if a person asserting the right to inspect, copy, or receive a public record in a FOIA action prevails, "the court shall award reasonable attorneys' fees, costs, and disbursements." "A plaintiff has prevailed if: (1) the action was reasonably necessary to compel the disclosure; and (2) the action had the substantial causative effect on the delivery of the information to the plaintiff." *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 289; 713 NW2d 28 (2005) (quotations omitted). The majority concludes that plaintiff failed to meet the first requirement of showing that his FOIA action was reasonably necessary to obtain the records because the records could have been obtained through other means. MCL 15.240(6) awards fees on the basis of whether the plaintiff prevails in a FOIA action. Thus, the requirement that the action be reasonably necessary to compel disclosure focuses on whether the FOIA action was reasonably necessary to compel disclosure *from the public body*. That the documents were available from another source is irrelevant to such a consideration. Nevertheless, because I agree with the majority's decision that plaintiff abandoned a request for attorney fees by failing to develop any argument on this issue, and because plaintiff received the only videos to which he was entitled, I concur with the result reached by the majority.

/s/ Jane M. Beckering

¹ Defendants have not claimed any exemptions in this case. Moreover, on this record, none of the statutory exemptions are applicable.